# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 714

EASTERN AIR LINES, INC., PETITIONER

*v.*

CIVIL AERONAUTICS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The court below rendered no opinion. The pertinent orders and findings of the Civil Aeronautics Board (R. 27-31, 49-57) have not been reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 15, 1951 (R. 58). The petition for a writ of certiorari was filed on May 2, 1951. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether, and to what extent, this proceeding attacking the validity of an exemption order issued by the Civil Aeronautics Board under section 416 (b) (1) of the Civil Aeronautics Act has become moot in view of the expiration of the challenged order by its own terms and the issuance on new findings of a new exemption order conferring like authority.

2. Whether an exemption application under section 416 (b) (1) of the Civil Aeronautics Act is required to be determined "after opportunity for an agency hearing" so as to make applicable the requirements of sections 5, 7, and 8 of the Administrative Procedure Act.

3. Whether petitioner has a constitutional right to a hearing on an application for exemption which results in the grant of additional operating rights to its competitor.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act (52 Stat. 973), as amended (49 U.S.C. 401 *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in Appendix A, *infra*, pp. 15-24.

STATEMENT

Section 401 of the Civil Aeronautics Act (hereinafter referred to as the Act) prohibits an air

carrier from engaging in air transportation unless it has been issued a certificate by the Civil Aeronautics Board authorizing it to do so. Provision is made for the filing of an application for such authority, the conduct of a public hearing on the application, and the issuance of a certificate by the Board if it finds that the applicant is "fit, willing, and able" and that the transportation is "required by the public convenience and necessity" (Sec. 401(d), *infra,* p. 17). However, section 416 (b) (1) of the Act authorizes the Board to exempt an air carrier from the requirements of many provisions of the Act, including those of section 401, if it finds that the enforcement of such provision is or would be "an undue burden on such air carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier * * * and is not in the public interest" (*infra,* p. 21). Unlike section 401, section 416 (b) (1) makes no reference to the conduct of a hearing.

At the time this proceeding commenced, Piedmont Aviation Inc. (Piedmont) held a temporary certificate of public convenience and necessity, expiring December 12, 1950, authorizing it, *inter alia,* to engage in air transportation "between the terminal point Roanoke, Va., the intermediate points Danville, Va., Greensboro-High Point, N. C., Raleigh-Durham, N. C., and Fayetteville, N. C., and the terminal point Wilmington, N. C." (R. 28;

see map facing this page).[1] Piedmont was also authorized to serve Winston-Salem, North Carolina, where its main maintenance base was located (R. 18), on another segment of its route, but it could not render service directly (*i.e.*, non-stop) between Winston-Salem and Roanoke (R. 27-28; see map).

On September 8, 1949, Piedmont filed with the Board a verified application for exemption pursuant to section 416 (b) of the Act which, if granted, would permit it to route one of the two daily round trips it was operating between Greensboro-High Point and Roanoke, through Winston-Salem, instead of routing them both through Danville (R. 16-17). In support of its application, Piedmont alleged that the authority sought would permit it to render better service to the public and to achieve substantial operating economies (R. 17-19). On September 22, 1949, petitioner, which was authorized by its certificate to render service directly between Winston-Salem and Roanoke, requested the Board to deny immediately Piedmont's application or to set it down for public hearing (R. 20-21). On October 25 Piedmont filed a letter with the Board supplementing its application (R. 23-25), to which petitioner replied on November 3 (R. 25-27).

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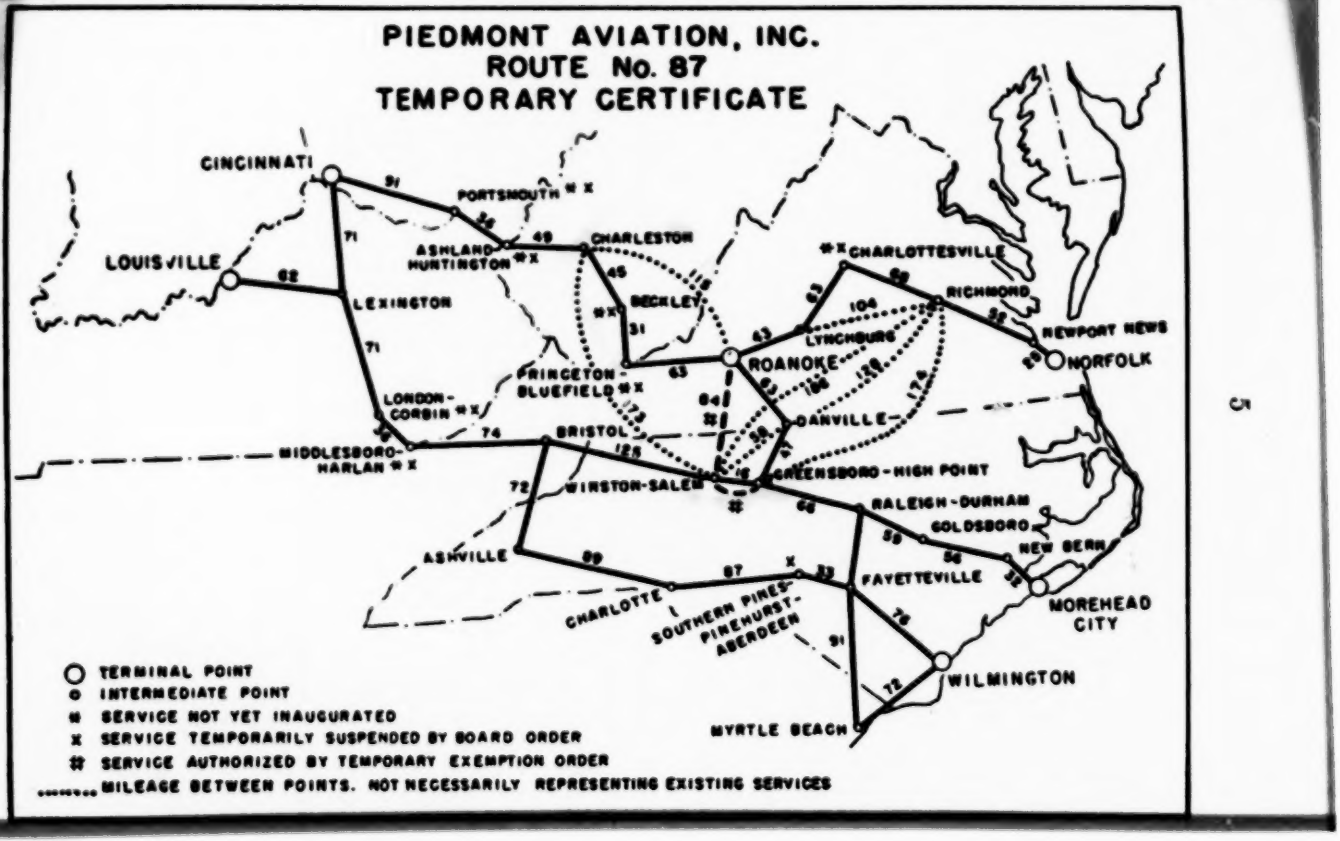
[1] This Court reviewed and sustained the Board's order awarding a temporary certificate to Piedmont in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572.

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On December 1, 1949, the Board entered an order granting Piedmont an exemption from the provisions of section 401 (a) of the Act "insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville, Va., on one daily round trip flight over segment 3 of its route No. 87" (R. 30). The Board predicated its order upon findings (1) that the exemption would "permit Piedmont to achieve economies in its operation and enable it to afford better service to the public"; (2) that it would "have no substantial adverse effect upon any other certificated carrier"; and (3) that enforcement of the provisions of Section 401 (a) of the Act "would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting, its operations, and is not in the public interest" (R. 29-30). The order provided that "the exemption granted herein shall terminate December 12, 1950" (R. 30), which was the date Piedmont's certificate expired.

On January 3, 1950, petitioner filed with the Board a petition for hearing, argument, and reconsideration with respect to the Board's exemption order (R. 31-39). On February 1, Piedmont filed a reply and also a motion to strike the petition for reconsideration (R. 40-45). Petitioner answered by letter dated February 4 (R. 45-48). On April 5, 1950, the Board entered an order denying the petition for hearing, argument, and recon-

sideration (R. 49). The order set forth in some detail the findings and reasons upon which it was based (R. 49-57).

Petitioner sought judicial review of the order granting exemption and the order denying reconsideration by a petition for review dated June 1, 1950 (R. 1-15). On March 15, 1951, the court of appeals entered its judgment and decree affirming the orders of the Board, citing in support of its action *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426 (C.A.D.C.)[2] (R. 58-59).

A proper understanding of the current status of the instant proceeding requires brief reference to two other applications filed with the Board by Piedmont and two other orders entered by the Board, none of which is included in the record of this proceeding (cf. Pet. 7-8). As petitioner has indicated, both Piedmont's temporary certificate and its exemption order provided that they would terminate on December 12, 1950. Many months prior to the termination of the temporary certificate, Piedmont filed an application for its renewal (Docket 3727). Further, on November 27, 1950, in accordance with its established practice, the Board instituted a proceeding (Docket 4762) in

[2] The decision referred to was before the Court in *Eastern Airlines, Inc.* v. *Civil Aeronautics Board,* No. 567, this Term. On April 9, 1951, this Court entered a *per curiam* order in the matter as follows: "The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that Court with directions to dismiss the proceeding upon the ground that the cause is moot."

which renewal of Piedmont's certificate with certain modifications (including certification of the authority covered by the exemption order here challenged) was proposed. As petitioner states, that proceeding "is now in the very early stages" (Pet. 8); it probably cannot be concluded within a year.

In addition to its application for the renewal of its certificate, Piedmont filed on December 7, 1950, prior to termination of its exemption authority, an application for an extension of its exemption order or for a new exemption order, to be effective until disposition of the certificate renewal proceeding (Docket 4085). Although the petition for certiorari makes no reference to this application, petitioner filed an objection to the application on December 12, 1950, and, after Piedmont replied thereto on December 26, a further objection on January 8, 1951. Upon consideration of Piedmont's application and supporting papers and petitioner's objections, the Board, without holding a hearing, adopted an order (Order Serial No. E-5365) on May 9, 1951, setting forth its findings and granting Piedmont a new exemption identical to that challenged in this proceeding. The order provides for the continuance of the exemption during the pendency of the Piedmont certificate renewal proceeding. For the convenience of the Court the Board's order is reproduced in Appendix B, *infra,* pp. 24-29.

ARGUMENT

1. Petitioner urges that, pursuant to the third sentence of section 9 (b) of the Administrative Procedure Act,[3] the authority conferred upon Piedmont by the exemption order which is the subject of this proceeding has been and will be continued in effect as a matter of law until final disposition of the proceeding with respect to the renewal of Piedmont's temporary certificate. Since the conclusion of the latter proceeding can be expected to require more time than the review which might be accorded by this Court, petitioner asserts that the proceeding is not now moot and will not become moot before this Court has completed its review (Pet. 2, 7-8).

It is true that Piedmont filed a timely and sufficient application for renewal of its certificate and that in accordance with section 9 (b) of the Administrative Procedure Act the authority conferred by such certificate continues until disposition of such application. It does not follow, however, that the separate authority conferred by Piedmont's exemption order was continued in effect until disposition of such certificate application. The exemption order expired by its own terms on December 12, 1950. Piedmont filed an application for its

[3] 60 Stat. 242, 5 U.S.C. 1008(b). "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

extension or renewal on December 7, 1950. Assuming, *arguendo*, that this application was timely and sufficient, and that section 9 (b) applies to the renewal of an exemption from licensing requirements such as is involved here, the extension of such authority pursuant to section 9 (b) nevertheless continues only until disposition of the application for extension or renewal of the exemption. Piedmont's new application for exemption having been disposed of by the Board's order of May 9, 1951, granting Piedmont a new exemption, it is clear that the original exemption order, even if assumed to have been extended by section 9 (b), terminated on May 9, 1951, when the new exemption became effective. Petitioner's suggestion that Piedmont's exemption authority is continued by operation of law until disposition of the certificate renewal proceeding finds no basis in reason or in the language of section 9 (b).

At the present time, therefore, the orders challenged by petitioner in this proceeding are no longer effective and there is no subject matter upon which the judgment of the Court can operate. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al.* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, and cases cited therein (at p. 418). However, the situation differs from that presented in *Eastern Airlines* v. *Civil Aeronautics Board*, No. 567, this Term, which this Court

held to be moot. In that case, not only had the challenged orders expired, but the Board had issued an amended certificate embodying the authority previously granted by exemption so that, as a practical matter, renewal of the challenged exemption was precluded. In the present case, no such certificate amendment has been made, and it is extremely unlikely that any such amendment can be made within the coming year. Moreover, until the proceeding for the renewal and amendment of Piedmont's certificate has been completed, Piedmont is authorized by the later exemption order, entered without hearing, to exercise the same authority that it possessed under the exemption order which is challenged here.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, this Court held that the expiration of the order of the Commission there appealed from did not render the case moot, stating: "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress" (219 U.S. at p. 515). See also *Gay Union Corp.* v. *Wallace,*

112 F. 2d 192, 195 (C.A.D.C.), certiorari denied, 310 U. S. 647.

Only one of the two issues raised by petitioner falls within the *Southern Pacific Terminal* rule. The two issues are: (1) whether the challenged orders of the Board set forth adequate findings of fact which are supported by substantial evidence (Pet. 51-65); and (2) whether the Board may grant an air carrier new route authority by an exemption order issued under section 416 (b) of the Civil Aeronautics Act without affording a competing carrier an opportunity for a formal hearing (Pet. 24-51). We think it is abundantly clear that the first issue is moot and not open to consideration under the doctrine of the *Southern Pacific Terminal* case. The adequacy of the findings supporting the expired order and the substantiality of the evidence supporting the findings do not present questions of general importance or of a recurring nature. The findings and evidence supporting the exemption order now in effect differ from the findings and evidence supporting the expired order, and a judicial determination with respect to the old order will have no effect upon the rights of the parties under the exemption order now in effect. The second issue (relating to hearing), however, does present an "important and recurring question" (*Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 185 F. 2d 426, 427) and thus appears to be within the ambit of judicial power under the *Southern Pacific Termi-*

*nal* case, *supra.* And see *Boise City Irr. and Land Co.* v. *Clark,* 131 Fed. 415, 419 (C.A. 9).

2. Although the issue with respect to the necessity for a hearing before the Board in this proceeding may be considered by the Court, we submit that the decision below is plainly correct and further review is not warranted. The opinion of the court of appeals in the prior *Eastern Air Lines* case (before this Court in No. 567), which the court of appeals relied upon in the present case, demonstrates conclusively that the Board is not required to hold a hearing before issuing an exemption order under section 416 (b) of the Act. Petitioner concedes that, apart from the question of mootness, "this case presents substantially the same legal issues as" did No. 567 (Pet. 2), and the arguments advanced by petitioner here are the same as those advanced in No. 567 with a single unimportant exception.[4] Those arguments were fully discussed

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[4] The only new arguments advanced in this case are predicated on the opinion of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. Petitioner asserts (Pet. 16-17, 34-35, 44) that the decision below conflicts with the decision in the *Universal Camera* case because the lower court failed to assume the "responsibility" for the Board's determination contemplated by this Court's opinion, that the lower court could not assume such responsibility because there was no "hearing," no "whole record," and no "examiner's report," and that the decision in the *Universal Camera* case requires a hearing in this case. Patently, the scope and character of judicial review contemplated by the Administrative Procedure Act, as expounded in the *Universal Camera* case, sheds no revealing light on whether Congress provided in section 416 (b) of the Civil Aeronautics Act that the Board should hold hearings before issuing exemption orders.

in the Brief In Opposition in No. 567 (pp. 11-22), to which we respectfully refer the Court. Moreover, it should be noted that in the pending proceeding to determine whether Piedmont's certificate should be renewed, as in No. 567, the Board will determine, after a full hearing, whether Piedmont's certificate if renewed should contain the additional operating authority to which the petitioner objects.

## CONCLUSION

One of the questions presented is moot, the decision below is correct with respect to the other question presented, and there is no conflict of authority. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1951.

APPENDIX A

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[5] are as follows:

DECLARATION OF POLICY

SEC. 2. [49 U. S. C. 402] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity;

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to

[5] Act of June 23, 1938, 52 Stat. 973, 49 U. S. C. 401 *et seq.*, Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401 *et seq.*

the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

CERTIFICATE REQUIRED

SEC. 401. [49 U. S. C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

APPLICATION FOR CERTIFICATE

(b) Application for certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

NOTICE OF APPLICATION

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

ISSUANCE OF CERTIFICATE

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform

to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

EXISTING AIR CARRIERS

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Board upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided,* That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in

such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Board shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Board shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismarck, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Flor-

ida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

* * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provisions, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * *

CLASSIFICATION

SEC. 416. [49 U. S. C. 496] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

EXEMPTIONS

(b) (1). The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted

during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

* * * * *

ORDERS OF BOARD SUBJECT TO REVIEW

SEC. 1006. [49 U. S. C. 656] (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by

any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

The pertinent provisions of the Administrative Procedure Act[6] are as follows:

Sec. 2. As used in this Act—

* * * * *

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; * * *

(a) NOTICE. — * * *

(b) PROCEDURE. — * * *

[6] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*

(c) SEPARATION OF FUNCTIONS. — * * *

(d) DECLARATORY ORDERS. — * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS. — * * *

(b) HEARING POWERS. — * * *

(c) EVIDENCE. — * * *

(d) RECORD. — * * *

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES. — * * *

(b) SUBMITTALS AND DECISIONS. — * * *

Sec. 9. In the exercise of any power or authority — * * *

(b) LICENSES. — * * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

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APPENDIX B

Orders Serial Number E-5365.

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 9th day of May, 1951.

Docket No. 4085

In the matter of the application of PIEDMONT AVIATION, INC. for exemption from the requirements of the Civil Aeronautics Act of 1938, as amended.

ORDER GRANTING EXEMPTION

Piedmont Aviation, Inc. (Piedmont), is the holder of a temporary certificate of public convenience and necessity for route No. 87, authorizing it, *inter alia,* to engage in air transportation of persons, property, and mail over various segments. Although said certificate contains a provision for termination thereof on December 12, 1950, Piedmont filed on April 11, 1947, as amended January 23, 1951, an application with the Board, Docket No. 3727, requesting, *inter alia,* an extension of its existing certificate; and pending the Board's final determination of said application, Piedmont's aforementioned certificate has continued in effect, by operation of law.

The Board by Order Serial No. E-3635, dated December 1, 1949, granted Piedmont a temporary exemption until December 12, 1950, from the provisions of section 401(a) of the Act insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville Va., on one daily round trip flight over segment 3 of its route No. 87; *Provided,* That Piedmont shall serve Danville on at least one daily round trip flight.

Piedmont filed with the Board on December 7, 1950, an application for an extension of the aforesaid exemption until such time as the Board shall

have reached a final determination in the *Piedmont Certificate Renewal Case,* Docket No. 4762, or in the alternative, an exemption order granting such authority until the Board's final determination of the aforesaid renewal case.

The Board by its Opinion and Order to Show Cause, Order Serial No. E-4876 dated November 27, 1950, provided, *inter alia,* that Piedmont show cause why the Board should not order the alteration, amendment, or modification of its temporary certificate of public convenience and necessity for route No. 87, so as to renew said certificate and so as to include Winston-Salem, N. C., as an alternate intermediate point to the intermediate point Danville, Va., on segment 3.

Piedmont represents in support of its application for the aforementioned exemption, *inter alia,* that in view of the findings heretofore made in Order Serial No. E-3635 with respect to said exemption, and the pendency of a proceeding for the renewal of Piedmont's certificate, it would be an undue burden on Piedmont to require enforcement of the Act, with respect to serving Winston-Salem as an alternate intermediate point to Danville.

Eastern Air Lines, Inc. (Eastern), filed with the Board on December 11 and 12, 1950, requests that Piedmont's application for extension of its exemption be denied.

Piedmont filed with the Board on December 26, 1950, a reply to Eastern's aforesaid request; and Eastern filed with the Board on January 8, 1951, an answer to said reply.

The Board, upon consideration of the aforementioned application herein, the documents filed in support thereof, and the opposition thereto, acting pursuant to the authority vested by the Civil Aeronautics Act of 1938, as amended, particularly section 416(b) thereof, finds:

1. That the circumstances set forth in Order Serial No. E-3635, dated December 1, 1949, as affirmed on reconsideration by Order Serial No. E-4041, dated April 5, 1950, which warranted the granting of a temporary exemption to Piedmont, remain substantially unchanged;

2. That the results of Piedmont's operations under the previous exemption order show that (1) the exemption has permitted Piedmont to achieve substantial operating economies, (2) the exemption has permitted Piedmont to generate more traffic than it otherwise would have been able to generate; and (3) the exemption has not reduced service to Danville below the amount which is needed;

3. That the Board, by its Order to Show Cause, in the *Piedmont Renewal Case,* Docket No. 4762, proposes, *inter alia,* the amendment of Piedmont's said certificate so as to provide the authority herein granted by exemption;

4. That Piedmont's existing certificate continues in effect by operation of law pending the Board's final decision in the aforesaid renewal proceeding, as consolidated; and that said proceeding will be set for hearing at an early date;

5. That, as indicated by the Board's Airline Traffic Survey for representative past months both before and after the grant of the earlier exemption

to Piedmont (March 1949, September 1949, and March 1950) and the Form 41 reports of Piedmont and Eastern for the year 1949 and the first three quarters of 1950, the exemption granted herein will have no substantial adverse effect upon Eastern or any other certificated air carrier;

6. That Eastern has not set forth matters warranting the denial of Piedmont's application herein; and

7. That in view of the foregoing considerations and the limited duration of the effectiveness of Piedmont's existing certificate of public convenience and necessity for route No. 87, the present enforcement of the provisions of section 401(a) of the Act, and the provisions of Piedmont's amended temporary certificate of public convenience and necessity for route No. 87, insofar as they would prevent the service authorized herein, would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting its operations, and is not in the public interest.

IT IS ORDERED:

1. That Piedmont be and hereby is exempted from the provisions of section 401(a) of the Civil Aeronautics Act of 1938, as amended, and the provisions of its amended temporary certificate for route No. 87, insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville, Va., on one daily round trip flight over segment 3 of its route No. 87; *Provided,* That Piedmont shall serve Danville on at least one daily round-trip flight;

2. That the aforementioned requests of Eastern be and hereby are denied;

3. That the exemption granted herein shall terminate 60 days after the Board's final decision in the *Piedmont Certificate Renewal Case,* Docket No. 4762;

4. That Piedmont's application herein, except to the extent granted, be and hereby is denied; and

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

[S.] M. C. MULLIGAN,
*Secretary.*

[SEAL]

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